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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ANIBAL RODRIGUEZ, JULIEANNA MUNIZ, ELIZA CAMBAY, SAL CATALDO, EMIR GOENAGA, JULIAN SANTIAGO, HAROLD NYANJOM, KELLIE NYANJOM, and SUSAN LYNN HARVEY, individually and on behalf of all other similarly situated,

Plaintiffs,

V.

GOOGLE LLC,

Defendant.

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Case No. 3:20-cv-4688-RS

**JOINT LETTER BRIEF RE:
DISCOVERY DISPUTE
CONCERNING PLAINTIFFS'
DOCUMENT REQUESTS, SET NO.
ONE, REQUESTS NOS. 1 & 2**

Judge: Hon. Richard Seeborg
Action Filed: July 14, 2020
Trial Date: Not Set
Place: Courtroom 3 – 17th Floor

1 Plaintiffs and Google LLC (“Google”) submit this joint letter brief regarding Plaintiffs’
 2 Document Requests, Set One, Request Nos. 1 & 2. Counsel for the parties met and conferred and
 3 reached an impasse on these requests. Ex. A includes Plaintiff’s requests, and Ex. B includes
 Google’s responses.

4 **PLAINTIFFS’ STATEMENT**

5 **1. PLAINTIFFS SEEK RELEVANT DOCUMENTS**

6 This case concerns Google’s privacy practices, including with (1) Google’s Firebase
 Software Development Kit (“Firebase”), a set of Google tools that allow Google to embed its
 code into third-party apps (e.g., the New York Times app for the iPhone) to collect user data, and
 (2) Google’s Web & App Activity (“WAA”), one of Google’s so-called privacy tools through
 which Google purports to enable consumers to stop Google’s data collection by turning WAA off.

7 Google promises consumers – and regulators – that consumers have the power to control
 9 Google’s data collection, using controls offered by Google, but Google then collects data in
 circumvention of those very controls. Dkt. 60 (“FAC”) ¶¶ 1-11. Google uses Firebase to
 surreptitiously and without consent collect data while users have WAA turned off, violating the
 Wiretap Act, the California Invasion of Privacy Act, the Comprehensive Computer Data Access
 and Fraud Act, and California’s Unfair Competition Law, and also intruding upon Plaintiffs’
 11 seclusion and their right to privacy under the California Constitution. FAC ¶¶ 235-314.

12 Given Google’s promises to regulators regarding consumers’ ability to stop Google’s data
 collection, and the existence of certain regulator investigations focusing on Google’s privacy
 13 practices, Plaintiffs served two document requests seeking, back to January 1, 2014, (1)
 documents Google has already provided to regulators concerning Firebase and Google’s
 14 collection, interception, tracking, or use of user data, including through or with Google Analytics
 (a reporting service that Google provides to apps with the data Google collects from Firebase)
 15 (Ex. A Request 1) and (2) written requests Google has received from any regulator concerning
 Google’s privacy practices or Firebase (Ex. A Request 2).

16 The requested documents are relevant as follows:

17 *First*, the requested documents are relevant to Plaintiffs’ claims and Google’s defenses.
 Plaintiffs’ requests focus on key factual issues in this case – Firebase and Google’s privacy
 18 practices – and reasonably seek such documents related to these issues from Google’s prior
 productions to regulators and regulator requests. For example, if Google produced documents
 19 evidencing the lack of consent to Google’s data collection with Firebase, in response to a
 regulator request regarding Firebase, then these requests seek such documents.

20 *Second*, the requested documents are relevant to Plaintiffs’ contention that Google has
 violated the 2011 FTC consent decree and the FTC Act. FAC ¶ 307. As a basis for their claims
 21 under the Wiretap Act and the UCL, Plaintiffs contend that Google has violated the FTC consent
 decree and the FTC Act. FAC ¶¶ 195-97, 307. The requested documents, as limited to Firebase
 22 and Google’s privacy practices, are relevant to those claims.

23 *Third*, the requested documents are relevant in terms of assessing the truthfulness of
 Google’s assertions in this action. For example, in its motion to dismiss, Google represents that it
 24 has consent to collect user data even when WAA is turned off. Dkt. 62. Yet Google has asserted
 to regulators that users are in control. For example, in September 2020, a Google executive stated
 25 during a Senate hearing that users “have control” and that Google “[u]sers own their data” and are
 “able to make a decision on how they control their data.” FAC ¶ 101. As detailed in the FAC,
 Google CEO Sundar Pichai has also repeatedly emphasized users’ ability to control Google’s data

1 collection. FAC ¶¶ 79, 90, 91, 99, 100. The requested documents are relevant in terms of
 2 assessing the truthfulness of these varying Google representations, including to regulators,
 3 regarding users' control over their data.

4 In addition to being highly relevant, the requested documents may help the parties
 5 streamline and avoid duplicative discovery in this action. To the extent there have already been
 6 regulator requests to Google and Google productions concerning the factual issues in this case,
 7 focusing on Firebase and Google's privacy practices, then producing those documents (in
 8 response to these requests) should help the parties navigate and streamline discovery here. It
 9 could avoid the need for duplicative discovery and also inform the parties' negotiations regarding
 10 custodians, search terms, and other discovery issues.

7 2. GOOGLE'S IMPROPER REFUSAL TO PRODUCE THESE DOCUMENTS

8 Google has refused to produce any documents responsive to these two requests. Ex. B at
 9 8:1-2 & 9:10-11. Google's main objection is undue burden. *See* Ex B 6:20-8:2 (Request 1
 10 objections iii, iv, vii) & 8:6-9:11 Request 2 objections iii, iv, vi). Google also raises other
 11 objections, including that the requests are not limited to seeking documents that "relate to the
 12 operative allegations in this Action." Ex. B at 7:16-17 & 8:25-26.

13 Google's objections are meritless and insufficient to support its burden in terms of
 14 withholding these documents. Google has not even stated the extent to which responsive
 15 documents exist, let alone established any undue burden in producing the requested documents.
 16 Plaintiffs seek a discrete set of documents (productions to or written requests from regulators)
 17 limited by time period (since January 1, 2014) and subject matter (Firebase and Google's privacy
 18 practices). It should be straightforward for Google to identify responsive documents, such as
 19 searching for "Firebase" or "Analytics" or "user data" in the productions and requests.

20 Given that Plaintiffs are seeking a subset of documents Google has already vetted,
 21 reviewed, and produced, this subset of documents would not require much additional effort or
 22 expense to produce compared to productions done from scratch. To the extent Google has
 23 concerns regarding the burden of re-reviewing documents, Google is free to turn over documents
 24 given to regulators and requests from regulators without further review, as such documents will
 25 necessarily already have been reviewed for applicable privileges. Plaintiffs also have no
 26 objection to Google re-asserting any previously-asserted confidentiality designations.

27 Nor are Plaintiffs requests particularly novel. In *Jones v. Deutsche Bank AG*, No. 5:04-
 28 CV-5357 JW (RS), 2005 WL 8177848, at *4 (N.D. Cal. Nov. 17, 2005) (Seeborg, J.), this Court
 29 ordered the defendant to produce documents previously produced "to any government agency"
 30 that "refer or relate to the CARDS Facility." Plaintiffs seek documents Google previously
 31 produced to regulators that refer or relate to Firebase or Google's user-data practices. This also
 32 would not be the first time Google has produced documents from other matters. *See Google, Inc.*
v. Am. Blind & Wallpaper Factory, Inc., No. 03-CV-5340 JF (RS), 2006 WL 5349265, at *1
 33 (N.D. Cal. Feb. 8, 2006) (Seeborg, J.) (Google produced documents from other litigation "since it
 34 posed no burden to Google to provide copies of the Geico documents to American").

35 The importance of the documents subject to Plaintiffs' requests plainly outweighs any
 36 purported burden. Production of the requested documents is especially important given Google's
 37 pending motion to dismiss, where Google asserts that consumers are powerless to stop Google's
 38 collection of data using Firebase. Google executives have proclaimed that users are in control
 39 (*e.g.*, FAC ¶¶ 79, 90, 91, 99-101), and Plaintiffs believe that Google made similar representations
 40 to regulators. With its motion to dismiss, Google assert that users have consented to Google's
 41 data collection regardless of whether those users turn off Web & App Activity, and that the

1 controls Google offers with “My Account” have no impact whatsoever on Google’s data
 2 collection using Firebase. Plaintiffs reasonably seek these regulator documents to demonstrate
 3 how Google’s position in this litigation is contrary to the position Google has otherwise taken.

4 Plaintiffs do not, as Google argues below, seek a “document dump from Google’s
 5 productions to regulators anywhere in the world dealing with privacy issues.” Request 2 does not
 6 even ask for documents produced in other matters, and Request 1 is tailored to Firebase and
 7 Google’s collection, interception, and use of user data. The cases Google cites are distinguishable
 8 for these (and other) reasons. Google’s reliance on *In re eBay* is particularly misplaced. There,
 9 the court explained that the producing party should be the one to search for and identify
 10 responsive documents. 2010 WL 2836815, at *3. Here, Plaintiffs seek relevant documents from
 11 those prior productions.

GOOGLE’S STATEMENT¹

12 Plaintiffs’ requests seek to circumvent the strictures of civil discovery. Plaintiffs accuse
 13 Google of violating the privacy of people who use third-party apps that have incorporated a
 14 Google product called Firebase SDK. Google Analytics for Firebase allows app developers to
 15 analyze how their users interact with their apps (whether or not they’re Google users). The app
 16 developers know they’re sending Google the data for analysis: they asked Google to do it. And
 17 Google requires app developers to obtain user consent for that analysis, and they in fact do that.

18 Plaintiffs don’t allege there’s anything wrong with this. They target a Google account
 19 setting called WAA that lets users save to their accounts information about their activity on
 20 Google services. Plaintiffs’ case is based on the argument that their consent is rendered
 21 ineffective when a third-party app user who is also a Google user turns WAA off. That theory is
 22 baseless and Google has filed a Motion to Dismiss set to be heard on March 4, 2021.

23 Plaintiffs’ RFPs 1 and 2 seek a document dump from Google’s productions to regulators
 24 anywhere in the world dealing with privacy issues; RFP 3, which Plaintiffs chose to address in a
 25 separate letter brief, seeks all documents from ongoing litigation between Google and the Arizona
 26 Attorney General. Plaintiffs’ counsel made the barest of efforts to tailor the RFPs to this case.

27 ¹ This Court requires the parties to present their first discovery dispute in “a joint letter of not
 28 more than 5 pages explaining the dispute” so a to-be-assigned Magistrate Judge can “advise the
 29 parties of how that Judge intends to proceed.” Dkt. 59 at 2. Google informed Plaintiffs that (1)
 30 Local Rule 3-4(c)(2) requires double-spacing, (2) Plaintiffs’ section far exceeds the 5-page limit,
 31 and (3) Plaintiffs violated the page limit further by serving *two* discovery letters on just three
 32 RFPs. Plaintiffs responded that they’ve seen single-spaced letters before (in cases where a
 33 Magistrate Judge was assigned with her/his own procedures), and that they would proceed to file
 34 their statement regardless. In an abundance of caution, Google’s statement is double-spaced.

1 Their brief argues that once a plaintiff has accused Google of *any* privacy violation, *everything*
 2 related to data privacy is relevant and discoverable. That's wrong.

3 RFP No. 1 seeks all documents Google has produced to a regulator relating to Firebase
 4 and user data. Google hasn't identified any production it has made in a regulatory investigation
 5 that was *focused* on Firebase and user data, and Plaintiffs have never identified one. But Google
 6 complies with requests from worldwide regulators, and to determine whether a document relating
 7 to Firebase and user data was provided to any given regulator would require an enormous burden;
 8 Google would have to collect each request, search them all, and review them. But "compelling a
 9 responding party to do duplicate searches—one for responsive documents in their custody and
 10 control and one for all documents in their custody and control that were previously produced in
 11 other litigation—is definitionally unduly burdensome." *Goro v. Flowers Foods, Inc.*, at *18 (S.D.
 12 Cal. Nov. 22, 2019). "If relevant and proportional documents exist in the custody or control of
 13 [Google], the appropriate thing to do is to request those documents." *Id.*; *see also In re eBay*
 14 *Seller Antitrust Litig.*, 2010 WL 2836815, at *3 (N.D. Cal. July 19, 2010) (discussing needle-in-
 15 haystack nature of requests for relevant documents in productions from other cases).

16 RFP 2 is no better. It seeks every written request a regulator has given to Google
 17 concerning "Google's privacy practices." This is a case about a *particular* Google practice, not
 18 *any* Google privacy practice. The request is fatally overbroad. What's more, Plaintiffs have never
 19 explained the utility of a written request from a regulator, anyway—certainly, such a request
 20 cannot tend to prove or disprove a relevant fact in this case.

21 Plaintiffs' first two RFPs are a shortcut, aimed not at documents related to the case, but at
 22 collections of documents compiled for other investigations on other subjects. The Court should
 23 require Plaintiffs to rely on RFPs tailored to the claims and defenses of *this* case. Indeed,
 24 Plaintiffs have no trouble writing RFPs—they've propounded 103 of them. That should be
 25 enough; Plaintiffs don't also need free rein to rummage through unrelated investigations.

26 This is not just common sense. It's the law. A document request "must describe with
 27 reasonable particularity each item or category of items to be inspected," and it must be relevant to
 28 the claims or defenses in the case. Fed. R. Civ. P. 26(b)(1); 34(b)(1)(A). A request for "*a carte*

1 *blanche* production of all documents” that were produced in another case doesn’t meet these
 2 criteria. *Chen v. Ampco Sys. Parking*, 2009 WL 2496729, at *2 (S.D. Cal. Aug. 14, 2009). And
 3 it’s worse where the other proceeding is a government investigation, because some regulators
 4 have discovery powers that exceed the permissible scope of civil discovery. As courts have held
 5 repeatedly, even if documents “produced in the government investigations” are relevant,
 6 Plaintiffs’ must “make proper discovery requests, identifying the specific categories of documents
 7 sought, in order to obtain them.” *King Cty. v. Merrill Lynch & Co.*, 2011 WL 3438491, at *3
 8 (W.D. Wash. Aug. 5, 2011). To hold otherwise “would expand the scope of discovery beyond
 9 that allowed by the Federal Rules.” *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, &*
 10 *Prod. Liab. Litig.*, 2017 WL 4680242, at *1 (N.D. Cal. Oct. 18, 2017).

11 Plaintiffs’ three relevance arguments speculate about what these document dumps might
 12 contain, and they all suffer from the same problem: they miss that whatever documents Google
 13 may have produced to a regulator that are truly relevant to *this* action will be produced in *this*
 14 case pursuant to the parties’ discovery negotiations and legitimate RFPs. As for Plaintiffs’
 15 argument that this will streamline discovery, they are not the first to make that argument. But
 16 while it may be more efficient for them, it is costly and prejudicial to Google. *See In re*
 17 *Volkswagen*, at *1 (rejecting similar argument).

18 Finally, *Jones v. Deutsche Bank* is way off the mark. Deutsche Bank identified the
 19 materials relating to a *specific* investment vehicle in relation to the plaintiff’s claims that the
 20 investment injured him. That kind of search, expected to yield few documents, is nothing like the
 21 unbounded search Plaintiffs request here.

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1 DATED: January 26, 2021

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ATTESTATION

I, Amanda Bonn, hereby attest, pursuant to N.D. Cal. Civil L.R. 5-1, that the concurrence to the filing of this document has been obtained from each signatory hereto.

DATED: January 26, 2021

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